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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/782,639	02/13/2001	Francis J. Bensur	31599/200998	2775
826	7590	01/06/2004		
ALSTON & BIRD LLP BANK OF AMERICA PLAZA 101 SOUTH TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000				EXAMINER MIGGINS, MICHAEL C
				ART UNIT 1772
				PAPER NUMBER 1772

DATE MAILED: 01/06/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/782,639	BENSUR, FRANCIS J.
Examiner	Art Unit	
Michael C. Miggins	1772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 09 December 2003.

2a)  This action is **FINAL**.                            2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## **Disposition of Claims**

4)  Claim(s) 1-12 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5)  Claim(s) \_\_\_\_\_ is/are allowed.  
6)  Claim(s) 1-12 is/are rejected.  
7)  Claim(s) \_\_\_\_\_ is/are objected to.  
8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on 13 February 2001 is/are: a)  accepted or b)  objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. §§ 119 and 120**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)  All b)  Some \* c)  None of:

1.  Certified copies of the priority documents have been received.

2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_.

3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

13)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

a)  The translation of the foreign language provisional application has been received.

14)  Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)      4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      5)  Notice of Informal Patent Application (PTO-152)  
3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.      6)  Other: \_\_\_\_\_

## DETAILED ACTION

### *Continued Examination Under 37 CFR 1.114*

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/9/2003 has been entered.

## WITHDRAWN REJECTIONS

2. The 35 USC 102(b) rejection of claims 1-8 and 10-12 set forth in the non-final rejection of 12/4/2002, pages 4-5, paragraphs 5-6 and repeated in the final rejection of 7/7/2003, page 2, has been withdrawn. The 35 USC 103 (a) rejection of claim 9 as unpatentable over Kunz et al. in view of Hatano et al. set forth in the final rejection of 7/7/2003, pages 3-4 has been withdrawn.

## REJECTIONS REPEATED

3. There are no rejections repeated.

### *Response to Arguments*

4. Applicant's arguments with respect to claims 1-12 have been considered but are moot in view of the new ground(s) of rejection.

## NEW REJECTIONS

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-8 and 10-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunz et al. (U.S. Patent No. 5,387,449) in view of Stillman (U.S. Patent No. 4,309,466).

Kunz et al. teach a flexible non-foil-based retort packaging structure (abstract, column 7, line 36 through column 9, line 26), comprising a barrier layer of polyester wherein metals and/or metal oxides are disposed thereon (since a ceramic oxide, aluminum or silicon oxide is deposited on a polyester and the ceramic layer can contain metals at least in smaller concentrations, see column 2, lines 1-68, column 4, lines 21-35 and column 5, lines 1-40), a layer of polyester laminated to one side of the layer of polyester (column 2, lines 1-68 and column 5, lines 1-40) and a layer of cast polypropylene laminated to an opposite side of the layer of polyester (column 2, lines 1-68 and column 3, lines 14-32), wherein the layers are laminated to one another using solvent-based retortable laminating adhesives (column 5, line 46 through column 6, line 35), wherein layers are laminated to one another using solventless retortable laminating adhesives (column 5, line 40 through column 6, lines 1-35), wherein the polyester layers

comprise polyethylene terephthalate (column 5, lines 19-35) and comprising at least two opposing portions having peripheral edge portions of the opposing portions heat-sealed together so as to form a pouch (column 7, line 36 through column 9, line 26) (applies to instant claims 1-3, 5-8 and 10-12).

Kunz et al. teach a flexible non-foil-based retort packaging further comprising ink printed on the side of the layer of polyester that faces the layer of metallized polyester (since Kunz et al. teach that the packaging material can be printed on the outside of the first film or in reverse image on the inner side, see column 2, lines 8-57 and especially column 7, lines 46-57) (applies to instant claim 4). Kunz et al. teach a flexible non-foil-based retort packaging comprising at least two opposing portions of the packaging structure having peripheral edge portions of the opposing portions heat-sealed together so as to form a pouch configuration (column 8, lines 4-68) (applies to instant claim 12).

Kunz et al. disclose applicant's invention substantially as claimed. However, Kunz et al. fail to disclose a barrier layer consisting essentially of metallized polyester.

Stillman teach a barrier layer consisting essentially of metallized polyester (since the metal is preferably aluminum, see column 3, lines 21-32) in a three layer sandwich packaging film in which the metallized polyester is the middle layer (column 2, lines 1-15, column 2, lines 45-60) (applies to instant claims 1 and 6) for the purpose of providing excellent protection from ultraviolet light, high resistance to vapor penetration, and an excellent barrier to penetration of liquids, particularly water or moisture, through the film (column 3, lines 26-32).

Therefore it would have been obvious to one of ordinary skill in the art at the time applicant's invention was made to have provided a barrier layer consisting essentially of metallized polyester as the middle layer in the packaging structure of Kunz et al. in order to provide excellent protection from ultraviolet light, high resistance to vapor penetration, and an excellent barrier to penetration of liquids, particularly water or moisture, through the film as taught or suggested by Stillman.

Claims 1 and 6 contain the limitation, "... capable of withstanding a retort process at a temperature in excess of 100 degrees C without melting or substantially degrading ...", with regards to the polyester barrier layer, the layer of polyester laminated to one side of the barrier layer and the layer of cast polypropylene. With regard to the polyester barrier layer and the layer of polyester laminated to one side of the barrier layer, Kunz et al. teach that the polyesters can be polyethylene terephthalate (column 3, lines 33-47) and polyethylene terephthalate does not melt or degrade at 101 degrees C. Moreover, Stillman teach a metallized polyester barrier layer which is metallized with aluminum (column 3, lines 21-32) and aluminum does not melt or degrade at 101 degrees C. With regards to the layer of cast polypropylene, Kunz et al. teach cast polypropylene (column 3, lines 14-32) and cast polypropylene does not melt or degrade at 101 degrees C.

Therefore, the combination of Kunz et al. and Stillman teach or suggest a metallized polyester barrier layer capable of withstanding a retort process at a temperature in excess of 100 degrees C without melting or substantially degrading, a layer of polyester laminated to one side of the barrier layer capable of withstanding a

retort process at a temperature in excess of 100 degrees C without melting or substantially degrading and a layer of cast polypropylene capable of withstanding a retort process at a temperature in excess of 100 degrees C without melting or substantially degrading since the combination discloses applicant's structure and composition of the layers. Moreover, it would have been obvious to provide the layers each capable of withstanding a retort process at a temperature in excess of 100 degrees C without melting or substantially degrading in order to provide packaging with improved structural durability (applies to instant claims 1 and 6).

7. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kunz et al. (U.S. Patent No. 5,387,449) in view of Stillman (U.S. Patent No. 4,309,466), as applied to claims 1-8 and 10-12 above and further in view of Hatano et al. (U.S. Patent No. 5,527,616).

Kunz et al. teach a flexible non-foil-based retort packaging further comprising ink printed on the side of the layer of polyester that faces the layer of metallized polyester (since Kunz et al. teach that the packaging material can be printed on the outside of the first film or in reverse image on the inner side, see column 2, lines 8-57 and especially column 7, lines 46-57) as discussed above.

Kunz et al. teach applicant's invention substantially as claimed. However, Kunz et al. fail to teach a layer of a retortable lacquer covering the ink.

Hatano et al. teach a layer of a retortable lacquer covering the ink (since acryl and urethane type compositions are retortable, see column 15, lines 5-25) in a pouch for the purpose of providing improved adhesiveness and to protect the ink.

Therefore it would have been obvious to one having ordinary skill in the art at the time applicant's invention was made to have provided a layer of a retortable lacquer covering the ink in the pouch of Kunz et al. in order to provide improved adhesiveness and to protect the ink.

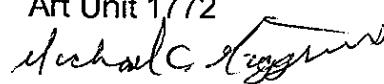
### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael C. Miggins whose telephone number is (703) 305-0915. The examiner can normally be reached on Monday-Friday; 1:30-10:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Pyon Harold can be reached on (703) 308-4251. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Michael C. Miggins  
Examiner  
Art Unit 1772



MCM  
December 23, 2004